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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 739

B'NAI B'RITH, INC.,

Petitioner

v.

SAUL E. JOFTES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR SAUL E. JOFTES IN OPPOSITION

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1. After over twenty years of employment by petitioner in various capacities, including but not limited to Director General of its Office of International Affairs, Secretary General of its International Council, and at the time material, its Director of Research, a Department Head (Appendix 26), at an annual salary of twenty thousand dollars, Saul E. Joftes, respondent, was dismissed instanter on January 5, 1968, by petitioner's President on the stated grounds of "gross personal misconduct." Respondent chose not to

contest his dismissal. After several ignored demands, he, by a letter dated January 16, 1968, to petitioner's Comptroller with copies to petitioner's President, Executive Vice President, and the President of a "Headquarters Staff Association", demanded severance pay, his unpaid salary to January 5, 1968, his accumulated vacation pay, a lump sum payment in lieu of the required notice period, and the return of his contributions to the B'nai B'rith retirement fund, with interest (Appendix 28-29). All of these were provided for in the agreement between petitioner and the Headquarters Staff Association, set forth in the Appendix at pages 14 to 22. The Headquarters Staff Association, as is shown by the agreement, is the only one such organization in the world. It is unaffiliated and resides only in the District of Columbia.

The President of B'nai B'rith, Inc., responded to this written demand by a letter dated February 14, 1968, in which he said, among other things,

> "* * * I see no purpose to be served in arguing the issues with you through correspondence. * * * your presence at any time in our headquarters building and your use of the parking area reserved for employees is both unwelcome and unauthorized and you are hereby directed not to enter this building or use the aforesaid parking area. I trust the foregoing will meet with your immediate compliance and will also terminate the need for any further correspondence between you and the undersigned." (Appendix 30-31).

Respondent Joftes thereafter received a check for his unpaid salary, and still later his contributions to the retirement fund were returned to him, with interest. No severance pay, accumulated leave, and/or notice pay, nor a decision as to whether he would get them or what he had to do to get a decision having been received, and his demands having been ignored, respondent Joftes filed this action on October 14, 1968.

The Staff Association Agreement referred to above provides that an employee with over twenty years of service

who is dismissed for "gross personal misconduct" is entitled to receive a sum equal to one year's salary as severance pay (Articles XVII and VII); a lump sum for accumulated vacation pay (Article XV, 4a); and one month's notice of intent to dismiss (Article VII, 2a). The Agreement also contains "Article XVIII–Grievance Procedure" (Appendix 21-22). It provides that if a member of the Staff Association has a "grievance" he "shall have the right" to file it personally. It provides further that if he starts a grievance, he must talk to his immediate supervisor first. Respondent Joftes' immediate supervisor was the Executive Vice President who had tried to fire him in 1967 (Appendix 23-25). The Agreement provides, further, that if a grievant does not get satisfaction from the Executive Vice President within two weeks, he "shall have the right" to appeal to the President of B'nai B'rith, the man who had just fired respondent Joftes and had written him the February 14, 1968 letter. The "Grievance Procedure" also provides that if a grievant does not get satisfaction from the President of the Order within six weeks, he "shall have the right" to submit his demands to arbitration. The Agreement also provides that demands for severance pay could also be taken to "a B'nai B'rith Committee composed of the President, Executive Vice President, and Chairman of the Personnel Practices Committee." (Article XVII).

2. Petitioner, although the argument was not made in the trial Court, argued to the Court of Appeals and argues here that this Court's decision in *Republic Steel Corporation v. Maddox*, 379 U.S. 650 (1965), should have caused a reversal in the Court of Appeals or one here. The Court of Appeals affirmed the trial Court per curiam and without opinion. Respondent Joftes argued there, as he does here, that the facts distinguish the two cases. (1) The members of the "Headquarters Staff Association" are not "employees" as contemplated by the Federal Labor Management Relations Act. (2) The "Association" is not a "labor union" as defined by the Act. (3) Respondent Joftes was a supervisor not covered by the Act. (4) Petitioner was estopped by the

conduct of its President to rely on unexhausted grievance and arbitration procedures as a defense to the Court action. (5) Any attempt to get relief by the grievance procedure route would have been futile and, therefore, unnecessary. (6) The Article XVIII grievance procedure was not the exclusive method for determination of Mr. Joftes' claims and he, therefore, was not limited to it.

International Organization of Masters, M & P v. N.L.R.B., 122 U.S. App. D.C. 74, 351 F.2d 771 (1965), supports points (1) and (2). We question the propriety of petitioner's statement on page 7 of his petition that "the fact is that the majority [of the members of the Headquarters Staff Association] are non-supervisory" because there is no such evidence in the record. This is a patent attempt to dull the impact of the above cited case by supplying "facts" not of record. The issue was not raised in the trial Court. *International Union of United Brewery, F.C.S.D. and D. Workers of America, AFL-CIO v. N.L.R.B.*, 111 U.S. App. D.C. 383, 298 F.2d 297, 302-305 (1961), *cert. den.* 369 U.S. 843 (1962), supports point 3. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967), supports point 4. We question the propriety of petitioner's unsupported statement on page 8 about what happened during argument in the Court of Appeals and we remember nothing during that argument that would support the statement if it were permissible to urge this Court to take action on the basis of matters not of record. *Humphrey v. Moore*, 375 U.S. 335 (1964), supports point 5. *Republic Steel Corporation v. Maddox, supra*, supports point 6.

Since petitioner relies exclusively on the contention that the action of the Court of Appeals is in conflict with this Court's decision in *Maddox*, the petition for a writ of certiorari should be denied because of the many distinguishing features in the instant case.

Respectfully submitted,

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Attorney for Respondent

October, 1970.